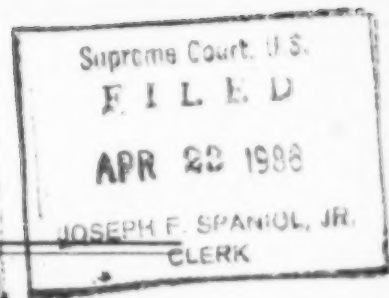


No. 85-1244



In the Supreme Court of the United States

OCTOBER TERM, 1985

CITY OF PLEASANT GROVE, APPELLANT

v.

UNITED STATES OF AMERICA

*ON APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA*

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether the annexation by an all-white municipality for racially discriminatory purposes of a vacant area and an area inhabited exclusively by whites violates Section 5 of the Voting Rights Act, 42 U.S.C. 1973c.

2. Whether the district court's finding that the annexations at issue were motivated by racially discriminatory purposes is clearly erroneous.

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Pursuant to Rule 16.1 of the Rules of this Court, the United States moves for affirmance of the judgment of the district court in this case.

OPINIONS BELOW

The opinion of the district court issued October 25, 1985, denying appellant's claim for declaratory relief (J.S. App. 1a-26a), is reported at 623 F. Supp. 782. The opinion of the district court issued August 3, 1983, denying appellant's motions for summary judgment (J.S. App. 1b-17b), is reported at 568 F. Supp. 1455.

JURISDICTION

The three-judge district court entered its judgment on October 25, 1985 (J.S. App. 1a-26a). Appellant filed its notice of appeal on December 19, 1985. The jurisdictional statement was filed on January 23, 1986. The jurisdiction of this Court is invoked under 42 U.S.C. 1973c.

(1)

STATEMENT

1. The City of Pleasant Grove is a suburb of Birmingham, Alabama, with an all-white population of approximately 7000 (J.S. App. 2b).¹ It lies in Jefferson County, which has a population of 671,197, one-third of whom are black (*ibid.*).

The city has approved four annexations: a parcel to the southeast of the city in 1945; sections to the north, south, and west of the city in 1967; the Glasgow Addition in 1971; and the Western Addition in 1979. None of these annexations brought any black inhabitants into the city. The city also actively pursued annexation of two other all-white areas—Sylvan Springs and West Grove—in 1969, but the United States Steel Corporation, as an intervening property owner, blocked that action. J.S. App. 3a & n.2.

The city has rejected five annexation requests: the site of the predominantly black Woodward School, which the city refused to annex in 1971 in order to avoid federal court desegregation orders (J.S. App. 3a n.3); the Pleasant Grove Highlands, an all-black area the city refused to annex in 1979 (*id.* at 3a); the Dolomite area, another all-black area the city refused to annex in 1979 (*id.* at 4a); and the Kohler and Westminster sections, which were all white, but were rejected because their annexations might produce a “mushroom effect” leading to the annexation of adjoining black areas (*id.* at 4a n.4).

This litigation was provoked by the annexation of the Western Addition in 1979. In February 1979, the city council voted to annex 430 acres of uninhabited property lying to the west (the Western Addition) (J.S. App. 3a). The

¹The city’s population during the relevant period included 32 black residents of Pleasant Grove nursing homes who, while presumably eligible to vote, were unregistered (J.S. App. 13a). The court treated the city as all white despite the nursing home residents (*id.* at 2b n.3).

annexation was approved by the Alabama legislature and signed into law by the governor on July 17, 1979 (*id.* at 14a n.1). City plans indicate this land will likely be used exclusively for white residential development (*id.* at 4a n.5).

While the annexation of the Western Addition was under consideration, black residents of Pleasant Grove Highlands and the Dolomite area petitioned the city for annexation. The city never formally acted on these petitions and, thus, effectively rejected them. J.S. App. 4b.

In 1980, the Attorney General refused to preclear the Western Addition annexation pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, on the ground that the city had failed to satisfy its burden of demonstrating that the annexation was not motivated, at least in part, by a racially discriminatory purpose (J.S. App. 10b-11b).

The city commenced this action pursuant to Section 5 of the Voting Rights Act in the United States District Court for the District of Columbia, seeking a declaratory judgment that the annexation of the Western Addition did not have the purpose or effect of denying or abridging the right to vote (J.S. App. 1b). During discovery the city revealed that it had never sought preclearance of the 1971 Glasgow Addition, which was occupied by 14 white citizens (*id.* at 17a-18a n.5), and the district court ordered the city to seek preclearance of that annexation as well (*id.* at 1b n.1) so that the cumulative effect of the annexations could be considered. See *City of Rome v. United States*, 472 F. Supp. 221, 247 (D.D.C. 1979), *aff’d*, 446 U.S. 156, 187 (1980).

2. In August 1983, the court denied the city’s motion for summary judgment. After noting “an astounding pattern of racial exclusion and discrimination in all phases of Pleasant Grove life” (J.S. App. 3b), including the areas of housing, employment, and education (*id.* at 4b-5b), the court found that the city’s annexation policy followed a similar pattern

(*id.* at 3b). Based on this pervasive history of discrimination and the city's persistent refusal to incorporate any black voters, while acting favorably on annexation requests from white voters, the court held that, for purposes of the summary judgment motion, the record justified a finding that the city made its annexation decisions on a racially discriminatory basis (J.S. App. 5b).

The court concluded that the absence of black voters from Pleasant Grove did not preclude a finding that the annexations violated Section 5. The court held that the city could violate Section 5 by acting with a discriminatory purpose, regardless of the absence of a dilutive effect (J.S. App. 7b). The court noted that the city, through its annexation policy, had decided on the basis of race who should vote in municipal elections and who should not (*id.* at 8b). That conclusion was supported by the Attorney General's consistent objection to racially selective annexation policies (*id.* at 10b).

Judge MacKinnon dissented on the ground that the two annexations under consideration did not change the existing voting rights of any member of a minority group since the city did not contain any black voters. He concluded that a purpose to discriminate was insufficient to violate Section 5 absent any possible effect on minority voting strength within the municipality (J.S. App. 11b-17b).

3. On October 25, 1985, the court decided the case on the merits. It held that Pleasant Grove had failed to sustain its burden of proving that the annexation policy did not have a racially discriminatory purpose in violation of Section 5. The court found that the location of the Western Addition and the city's plans for its development would likely result in an all-white area (J.S. App. 4a n.5). The court rejected the city's contention that its decision to annex the Western and

Glasgow areas, while simultaneously rejecting the application of the black Highlands area, was based on economic self-interest and not race. The court concluded that the city's economic argument was unsupported by the record and was a pretext for incorporating the white areas while excluding the black areas. *Id.* at 4a-10a. Moreover, the court's finding of racial purpose was supported by the city's history of "an astonishing hostility to the presence and rights of black Americans" (*id.* at 12a).

Judge MacKinnon again dissented. First, he took exception to the majority's finding that the uninhabited Western Addition would be occupied exclusively by whites (J.S. App. 16a-17a).² Judge MacKinnon further stated that while an impermissible purpose may violate Section 5, it must be a purpose related to voting and since the Western Addition was uninhabited, there could be no voting-related purpose (J.S. App. 18a-22a). Judge MacKinnon also found the city's annexation policy justified on financial grounds (*id.* at 22a-26a).

ARGUMENT

The city raises two main contentions in this appeal. First, it argues that its annexation of an all-white area and a vacant area cannot violate Section 5 since the city contains no black voters who can be harmed by the annexations (J.S. 11-16). It further challenges as clearly erroneous the district court's finding that the city's annexation practices were motivated by racial discrimination rather than economics (J.S. 16-17). Neither contention has merit.

²Judge MacKinnon acknowledged that the Glasgow area was inhabited exclusively by 14 members of a single white family, but concluded that the city had annexed the 40 acre parcel as a favor to the family and not for racial reasons. He stated further that, regardless of the disposition of the Glasgow Addition, the annexation of the Western Addition should be approved since it involved completely uninhabited land (Pet. App. 17a n.5).

The decisions of this Court and the established practice of the Department of Justice fully support a refusal to preclear boundary lines that have been redrawn with the purpose of extending the municipal franchise to whites while excluding black voters. Moreover, the city has failed to demonstrate a sufficient economic justification for its annexation policy to render clearly erroneous the court's finding that the city was motivated by racial animus toward blacks. Because the district court was correct in denying declaratory relief and the case does not present any novel issue, this Court should summarily affirm the judgment of the district court.

1. Pleasant Grove contends (J.S. 11-12) that its practice of annexing all-white or vacant areas while refusing to annex areas containing black voters cannot violate Section 5 of the Voting Rights Act so long as it successfully secures its boundaries against intrusion by any black residents. The city contends that by remaining all white it can avoid any prospect of dilution of black votes that this Court has found retrogressive and offensive to Section 5.

This Court has repeatedly emphasized, however, that a voting change motivated by racial animus, even absent a retrogressive effect, violates Section 5. *City of Rome v. United States*, 446 U.S. 156, 172 (1980); *Beer v. United States*, 425 U.S. 130, 141 (1976); *Perkins v. Matthews*, 400 U.S. 379, 387-388 (1971). In *City of Richmond v. United States*, 422 U.S. 358, 378 (1975), this Court explained why an annexation that had been found not to have a discriminatory effect had to be remanded to the district court for examination of its purpose:

The answer is plain, and we need not labor it. An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute. Section 5 forbids

voting changes taken with the purpose of denying the vote on the grounds of race or color.

Because official acts taken with a discriminatory purpose constitute "gross racial slurs" (*ibid.*), they cannot be tolerated under Section 5, regardless of whether they produce a retrogressive effect on minority voters. Thus, Pleasant Grove cannot successfully contend that its annexation of white and uninhabited areas does not violate Section 5 simply because there are currently no black voters in the city whose votes will be diluted. If, as the district court found, the purpose behind its annexation policy was, for purely racial reasons, to deny to future black voters full participation in the electoral process on equal terms with future white voters, the annexations violate Section 5.³

The Attorney General's interpretation of Section 5 fully supports the district court. Since at least 1972, the Attorney General has consistently objected to selective annexations motivated by racially discriminatory purposes, both of white or vacant areas, regardless of whether the annexation diluted the votes of minority voters remaining in the annexing jurisdiction.⁴

³Because the district court found that the city's purpose was to violate the rights of minority voters, the question whether there will be retrogression of minority voting rights sufficient to violate the Act is irrelevant. Moreover, given the city's racially discriminatory purpose in making the Western and Glasgow annexations, it is irrelevant whether the city's failure to annex other areas with black voters constitutes a change in voting practice or procedure under Section 5 (see J.S. 13-16).

⁴The United States submitted to the district court a list of objections interposed by the Attorney General to annexations on the ground that they reflected racially selective annexation policies. U.S. Supp. Mem. (filed Oct. 15, 1982). This list included objections to annexations by: Lake Providence, Louisiana (December 1, 1972); McComb, Mississippi (May 30, 1973, withdrawn October 21, 1974); McClellanville, South Carolina (May 6, 1974); Grenada, Mississippi (February 5, 1975);

2. A trial court's findings of discriminatory intent are factual findings which are subject to appellate review under the "clearly erroneous" standard of Rule 52(a), Fed. R. Civ. P. *Anderson v. Bessemer City*, No. 83-1623 (Mar. 19, 1985), slip op. 8-9. See *Rogers v. Lodge*, 458 U.S. 613, 622-623 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273, 285-290 (1982); *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 534-537 (1979).

Because of the deference due the trial court under the clearly erroneous standard, an appellate court may reverse a factual finding only if the evidence leaves it with the "definite and firm conviction that a mistake has been committed." *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 855 (1982), quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. Bessemer City*, slip op. 8.

The evidence in this case demonstrated that a racially discriminatory purpose was behind the contested annexations. Indeed, abundant evidence supports the court's conclusion. First, as the district court chronicled, Pleasant

Lumberton City School District, Lumberton, North Carolina (June 2, 1975); Bessemer, Alabama (September 12, 1975); Statesboro, Georgia (December 10, 1979); Pleasant Grove, Alabama (February 1, 1980).

The Attorney General does not interpret Section 5 as requiring all jurisdictions wishing to annex white or vacant areas to annex black areas as well. The great majority of submitted annexations involve white residential areas, but between 1965 and 1981, the Attorney General objected to only 245 of the 8,786 annexations submitted for Section 5 preclearance (U.S. Supp. Memo at 2 n.1 (filed Oct. 15, 1982)). The Attorney General will ordinarily object only if an annexation will dilute the votes of black residents of the submitting jurisdiction or, as in this case, the annexation will lead to voting changes and is motivated by a racially discriminatory purpose.

Grove has an undisputed history of official acts of racial discrimination. These included enactment of an exclusionary zoning ordinance that was struck down by a federal court because of its racially discriminatory effect in *Wheeler v. Pleasant Grove*, C.A. No. 78-G-1150-S (N.D. Ala., 1979); maintenance of its all-white character through racial steering, advertising and marketing directed exclusively toward white buyers; its attempt to secede from the Jefferson County school system after that system was ordered to desegregate and its establishment of an all-white school system, subsequently abolished by court order; and its failure to hire a single black employee while hiring white workers who resided up to 50 miles outside the city (J.S. App. 10a-12a). The district court correctly held this history relevant in determining the purpose behind the city's annexation policy. See *Rogers v. Lodge*, 458 U.S. at 624-626; *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977).

Turning specifically to the city's annexation policy, the court noted that Pleasant Grove has annexed numerous white or vacant areas, but has never approved annexation of an area containing a single black resident. Indeed, the court found that the city was so intent on remaining all white that it refused to annex two white areas because that action might have a "mushroom effect" leading to later annexations of adjacent black areas (J.S. App. 4a n.4).

The district court's finding of a racially discriminatory purpose did not depend solely on the City's long and pervasive history of racial discrimination. Other evidence supports the conclusion that the two contested annexations were racially motivated. The Glasgow addition was inhabited exclusively by 14 white citizens, and the Western addition, while uninhabited (J.S. App. 17a n.5), was intended exclusively for white residential development (*id.* at 4a n.5).

Such development could result in the addition of numerous white voters but no black voters to the rolls and could abridge the effective participation of blacks who may choose to register and vote in Pleasant Grove.⁵

In response to this evidence of discriminatory purpose, the city contends that it based its decision to annex the Western Addition, while refusing to annex any black areas, on economic considerations. It argues that annexation of the Western Addition would bring to it development fees for the houses to be built in that vacant area and that the two black regions offer no such benefits. As the district court found, however (J.S. App. 9a), the Highlands area contains sufficient undeveloped land for the construction of 80 new homes and, additionally, would generate immediate tax revenues for the city. Moreover, the district court found that the city had not undertaken any comparative economic analysis of the annexations and specifically found the city's allegations that it had done so to be a sham and labeled its economic justification a pretext for race-based discrimination (*id.* at 5a-6a). The city does not challenge the bulk of these findings in this Court, but simply reasserts that it annexed the Western Addition to benefit from the fees that new development would generate (J.S. 16-17). Nor does the city attempt to offer any justification for its annexation of

⁵The planned white residential development in the Western Addition makes clear that this addition comprises a voting change that is subject to review under Section 5. Of course, it is sometimes difficult to project whether an annexation of vacant land "will * * * have the effect of denying or abridging the right to vote on account of race or color" (42 U.S.C. 1973c). We have not found this task to present unusual difficulties in administrative Section 5 enforcement, however; in the case at bar, the city itself projected the development of the land and the fact that the development would serve white citizens is not seriously disputed. Obviously, the annexation of territory that will not lead to voting changes (*e.g.*, annexation of land for a public park) does not require Section 5 review.

the fully developed Glasgow Addition, which the district court found had imposed a financial burden on the city (J.S. App. 7a n.13). In sum, appellant's purported economic justification merely resurrects factual arguments that were properly rejected by the district court.

In view of Pleasant Grove's extraordinary history of official racial discrimination, its consistent refusal to annex black areas while annexing several white areas, the potential the annexations have to abridge the rights of current black residents and potential future black voters, and the pretextual character of the justifications for this policy, there was ample evidence to support the district court's finding that the Western and Glasgow annexations were motivated by race and, therefore, violated Section 5.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be summarily affirmed.

Respectfully submitted.

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